Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	**)**	
	)	
A National Broadband Plan	**)**	**GN Docket No. 09-51**
for Our Future	**)**	

To: The Commission

REPLY COMMENTS OF THE COALITION OF CONCERNED UTILITIES

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Dayton Power and Light Co.
FirstEnergy Corp.
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SUMMARY

Electric utility ratepayers currently subsidize the cable industry with artificially low cable-only pole attachment rates to the astounding tune of approximately $10 million per year for every 500,000 attachments that cable companies affix to electric utility poles. CLECs also receive a subsidy by electric ratepayers, but their subsidy is not nearly as much.

There is no reason for this disparity in pole attachment subsidies provided to communications company competitors to continue. Cable companies and CLECs now provide the same video, voice and Internet services. They should pay the same pole attachment rates.

One of the huge problems with the existing cable-only pole attachment subsidy is that there is simply no reason to believe that cable operators will take the tens of millions that they save on pole attachments in urban and suburban systems, where customers and revenues are abundant, and invest that money in rural areas where customers and potential revenues are scarce, and where there is little chance that they will receive an adequate return on their investments.

That, of course, is the reason why these areas have no wireline broadband service today. The reason that the cable industry does not deploy high speed broadband service in rural areas today is the enormous expense associated with head-end equipment installation and system upgrades – not the relatively minute costs associated with pole attachment rentals.

The National Cable and Telecommunications Association ("NCTA") and Senator Hutchinson are absolutely correct that providing targeted subsidies for rural system capital costs will spur the deployment of broadband in rural areas.

Continuing colossal pole attachment subsidies to gigantic cable television companies in the urban and suburban areas that they already serve, however, makes no sense at all. Not only

does broadband already exist in those areas, it is also unlikely to increase broadband investment in unserved rural areas. And subsidizing one industry (cable) more than another (CLECs) with artificially low attachment rates distorts the market for existing and future broadband services and reduces the competition that NCTA itself understands is necessary to spur the development of broadband services.

While advocating for targeted subsidies for unserved areas, NCTA also advocates the elimination of government-sponsored subsidies in the 92% of the country where broadband currently exists, to level the playing field among service providers to promote the offering of competitive broadband services. These subsidies that should be eliminated include the anticompetitive and outdated cable-only pole attachment subsidy.

Congress established the artificially low cable-only pole attachment rate subsidy in 1978 in order "to spur the growth of the cable industry, which in 1978 was in its infancy."[1] Comcast Corporation, with revenues of $34.3 billion last year and profits of $2.5 billion for each of the past three years, does not need subsidies, particularly one that is outdated, inefficient, unproductive and anticompetitive. The subsidy makes even less sense because it is provided by the electric utility industry, which is reducing its workforce and trimming other expenses because of tremendous public utility commission pressure to reduce rates.

To promote broadband development, the Commission should establish a uniform broadband attachment rate at a level above the existing telecom rate, and modify the Universal Service System to allow broadband providers in urban and suburban systems to contribute directly to the development of broadband services in rural and other unserved areas.

[1] H.R. Rep. No. 104-204, at 91 (1995).

Even if extending the antiquated, inefficient, unproductive and unfair cable-only pole attachment rate subsidy to CLECs made any sense from a policy perspective, the Commission does not possess the statutory authority to lower the attachment rate paid by CLECs to the cable-only rate. As confirmed by the Supreme Court and the Commission's own rulings, the Pole Attachment Act prohibits any uniform cable/CLEC broadband attachment rate that is lower than the existing telecom rate.

The Pole Attachment Act also prohibits the Commission from regulating the rates paid by ILECs to attach to electric utility poles, and establishing an ILEC broadband attachment rate at the same level as is may be established for cable companies and CLECs makes no policy sense anyway. Given the considerable financial and operational benefits of the ILEC-electric utility joint use/joint ownership relationships, granting pole-owning ILECs the same rate that is paid by third party licensee attachers like cable companies and CLECs would give the ILECs a huge competitive advantage.

The Commission should reject the poorly-considered proposals of wireless companies and others regarding make-ready deadlines and pole top access. As explained more fully in the ongoing Pole Attachment proceeding, while the Coalition wholeheartedly supports Commission efforts to expedite the provision of broadband service throughout the country, broadband service cannot come at the expense of the safe, reliable and efficient operation of the nation's electric utility distribution systems.

Proposals to apply the Pole Attachment Act to broadband-only attachments and electric transmission towers are similarly ill-considered, as is the proposal to remove the ability of electric utilities to deny access for lack of capacity.

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REPLY COMMENTS

Allegheny Power, Baltimore Gas and Electric, Dayton Power & Light, FirstEnergy, Kansas City Power & Light, National Grid, NSTAR and PPL (collectively, the "*Coalition of Concerned Utilities*" or "*Coalition*"), by their counsel and pursuant to Sections 1.415 and 1.430 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. §§ 1.415 and 1.430, hereby submit these Reply Comments in the above-captioned proceeding.

A. Eliminating the Cable Industry's Pole Attachment Rate Subsidy Will Promote Broadband Competition By Leveling the Playing Field For All Broadband Providers

Cable operators in this proceeding and in the pending Pole Attachment rulemaking proceeding[2] recognize that the rate they pay for attaching to distribution poles owned by electric utilities and incumbent local exchange carriers ("ILECs") is far lower than the rate paid by

[2] Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, 73 Fed. Reg. 6879, Notice of Proposed Rulemaking, (WC Docket No. 07-245) (Feb. 6, 2008) (hereinafter, "Pole Attachment Proceeding").

competitive local exchange carriers ("CLECs").[3] This unfair favoritism has been in effect since enactment of the Telecommunications Act of 1996.[4]

The cable industry's solution to this disparity is to support (reluctantly, it seems) a uniform rate for pole attachments used by cable companies and CLECs alike to provide broadband service, at the very low cable-only attachment rate currently applicable only to cable television systems.[5] They claim that this very low cable-only rate will promote broadband development by reducing costs.[6]

As explained below, however, providing the artificially low, subsidized cable-only rate to broadband providers would do precious little to promote broadband development, is poor public policy for a number of other reasons, and is impossible to do in any event because the Pole Attachment Act prohibits any uniform cable/CLEC broadband rate that is lower than the existing telecom rate.

A far better solution to promoting broadband development, which the cable industry itself seems to recognize,[7] is to eliminate government-sponsored subsidies (like the one-sided and outdated cable-only pole attachment subsidy) in the 92% of the country where broadband currently exists, to level the playing field among service providers to promote the offering of competitive broadband services, and to provide direct subsidies to those willing to provide broadband service to unserved areas.

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[3] *See, e.g.,* Comments of the National Cable Telecommunications Association ("NCTA Comments") at 35 (June 8, 2009).

[4] *See*, Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996). *See also*, 47 U.S.C. §§ 224(d), (e).

[5] NCTA Comments at 35.

[6] *Id*.

[7] *See* NCTA Comments at 26, and discussion of those Comments below.

As explained below, this can be accomplished in a way that is fair to all parties and consistent with the Pole Attachment Act by establishing a uniform broadband rate at a level above the existing telecom rate, and by modifying the Universal Service System to allow broadband providers in urban and suburban systems to contribute directly to the development of broadband services in rural and other unserved areas.

1. NCTA Itself Supports Eliminating Subsidies So That Competition Alone Can Spur Broadband Deployment

The Comments filed by the National Cable Telecommunications Association ("NCTA") explain that providing subsidies to areas where competition already exists is counterproductive. NCTA recommends eliminating subsidies in these areas because competition alone will spur deployment and better service:

> Moreover, unlike the case in many other nations that have relied heavily on government subsidies, most areas of the United States already are served by at least two vigorously competitive providers. This means not simply that it is less urgent to subsidize deployment in those areas but that it would be counterproductive to do so. As noted above – and as the rapid ongoing deployment and upgrading of broadband facilities by cable operators and telephone companies confirms – competition among facilities-based providers itself spurs further deployment and upgrades.[8]

2. The Existing Cable-Only Attachment Rate Is A Colossal Subsidy That Is Paid To The Cable Industry By Electric Utility Ratepayers And Unfairly Favors The Cable Industry At The Expense Of CLECs

In its Comments, the *Coalition* explained that electric utility ratepayers currently subsidize the cable industry with artificially low cable-only pole attachment rates to the astounding tune of approximately $10 million per year for every 500,000 attachments that cable

[8] NCTA Comments at 26.

companies affix to electric utility poles.[9] CLECs also receive a subsidy by electric ratepayers, but not nearly as much.

There is no reason for this disparity in pole attachment subsidies to continue. Cable companies and CLECs now provide (or endeavor to provide) the same video, voice and Internet services. The cable industry's Voice over Internet Protocol ("VoIP") service is the functional equivalent of (and is in some respects is superior to) circuit-switched telephone service. To the extent that any entity is providing broadband services, that entity should pay the same pole attachment rates as other entities that want to compete to provide the same services.

The *Coalition* supports NCTA's arguments that eliminating subsidies where broadband service currently is offered and leveling the playing field among broadband service providers is the best way to promote broadband competition.

To that end, the cable industry's colossal pole attachment subsidy should be terminated immediately and the gross disparity in pole attachment rates between cable operators and CLECs should be eliminated.

3. The Cable Industry Does Not Need Any Subsidies

The artificially low cable-only attachment rate served its purpose long ago and now is just an antiquated, unproductive and unfair mechanism whereby the electric utility industry, which is reducing its workforce and trimming other expenses because of tremendous public utility commission pressure to reduce rates, can subsidize highly profitable, multi-billion dollar cable company giants whose businesses are expanding rapidly.

This was not the intent of Congress when the cable-only pole attachment subsidy was created. Instead, Congress explained that cable companies were furnished with a low pole

[9] *Coalition* Comments at 3.

attachment rate in 1978 in order "to spur the growth of the cable industry, which in 1978 was in its infancy."[10]

Cable is no longer in its infancy. "CATV" companies have transformed themselves into communications giants, offering not only cable television service, but also video on demand, broadband Internet access and telephone services. They have now even entered the wireless broadband market.[11] At this late date, it is inappropriate to allow the cable and telephone industries to "piggy back" on electric utility poles without paying a full attachment rate that fairly reflects the benefits they receive (and the costs they save) when they deploy their attachments on someone else's distribution poles.

Comcast, the largest cable company in the country, boasts a market capitalization of some $27.3 billion.[12] It has 24.1 million cable customers, 15.3 million Internet access customers and 6.8 million voice customers.[13] Comcast has attracted enough voice customers that it recently supplanted Qwest as the third-largest residential phone provider in the nation.[14] The company reported revenue of $34.3 billion in 2008 and income of $2.54 billion.[15] In the first quarter of

[10] H.R. Rep. No. 104-204, at 91 (1995).

[11] See, Mike Regoway, *Comcast Sets Portland WiMAX Plans*, The Oregonian, June 29, 2009, available at http://www.oregonlive.com/business/index.ssf/2009/06/comcast_sets_portland_wimax_pl.html (last visited July 13, 2009). The article notes that Comcast began offering wireless Internet access to customers in the Portland area on June 30, 2009, piggybacking on Clearwire's WiMAX network. Comcast invested $1 billion in Clearwire, helping fund plans for a national WiMAX rollout. Portland is the first city to get Comcast's new wireless service, but the company plans to add WiMAX service in Atlanta, Chicago and Philadelphia by the end of the year.

[12] CNN Money, http://money.cnn.com/quote/quote.html?symb=CMCSA&mode=pressrelease, (last visited July 13, 2009).

[13] http://www.comcast.com/corporate/about/pressroom/corporateoverview/corporateoverview.html, (last visited July 13, 2009).

[14] See, Jeff Demos, *Online is in Line to Sign You up*, Standard-Examiner, July 10, 2009, available at http://www.standard.net/live/news/178084/ (last visited July 13, 2009).

[15] Comcast Corporation Form 10-K for fiscal year ended December 31, 2008, p. 21.

2009, Comcast gained nearly 329,000 new Internet subscribers and grew its quarterly profit six percent to $772 million.[16] Revenue for the quarter was up five percent to $8.84 billion.[17]

Not only are these attachers' subscriber numbers growing, the rates that these attachers charge subscribers for their services are higher now than ever. While the average monthly bill for cable's expanded basic programming package in 1998 was approximately $26.13, Comcast's average revenue per customer today is $110 per month (more than four times as high) and growing.[18] The "triple play" of video, broadband and voice generates average monthly revenues for Comcast of $120-$130 per customer (over five times as high).[19] These figures continue to increase.[20]

Comcast revenue has increased from $25 billion in 2006 to $30.9 billion in 2007 and then to $34.3 billion in 2008, while net income (profits) has held steady at the astounding level of approximately $2.5 billion for each of the last 3 years.[21]

Meanwhile, Comcast pays attachment rates of just a few dollars per pole *per year*. At this late date in the evolution of the cable industry, artificially low pole attachment rates for Comcast and other cable operators are an unjustified, government-mandated gift, at the expense of the electric utility industry and its ratepayers, not to mention the CLECs with which they compete.

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[16] See, Jeff Demos, *Online is in Line to Sign You up*, Standard-Examiner, July 10, 2009, available at http://www.standard.net/live/news/178084/ (last visited July 13, 2009).

[17] *Id*.

[18] Comcast Corporation Form 10-K for fiscal year ending December 31, 2008 at 26. The average monthly total revenue per video customer increased from $102 in 2007 and $95 in 2006.

[19] Comcast Corporation Form 10-K for fiscal year ending December 31, 2006 at 19.

[20] See, Comcast Reports First Quarter 2009 Results available at http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=1282445&highlight= (last visited July 13, 2009), (reporting 5% growth in consolidated revenue and 16% growth in operating income).

[21] Comcast Corporation Form 10-K for fiscal year ending December 31, 2008 at 21.

Many telecom providers, such as Time Warner Telecom Inc. ("TWTC"), also are huge companies that are fully capable of paying their own way. TWTC's video services are available in 26.8 million homes, its Internet service is available in 26.6 million homes and its telephone service is available in 25.9 million homes.[22] Its annual revenues for 2008 exceeded $17.2 billion.[23] TWTC, like other attachers, is hardly in need of (or deserving of) continued government handouts.

To the extent some kind of government mandated subsidies were appropriate to jump-start the cable or telecom industries in the early days of pole attachments, those days are long gone. Yet Comcast, TWTC and other media giants continue to get access to the most basic and essential component of "their" pole distribution systems for an artificially low fee that ill-serves the nation's electric utilities and their consumers.

4. There Is No Reason To Believe That Low Pole Attachment Rates Will Provide Broadband Service To Rural America

Unlike the profit-generating incentives in place with communications companies, traditional electric utility cost of service proceedings require utilities to include all revenues from pole attachments as an offset to their revenue requirements. In that way, revenues collected from pole attachments are passed through to electric utility ratepayers in the form of reduced overall rates. For this reason, electric utilities do not have the same profit-making motive with respect to pole attachments as do cable and telecommunications companies.

In contrast, no one really knows what cable operators do with their pole attachment subsidy dollars. In the urban, suburban and other areas where they currently provide service, cable operators receive tens of millions of dollars in subsidies per year from electric utility

[22] See Time Warner Telecom Inc SEC Form 10-K for fiscal year ending December 31, 2008 at 6-8.

[23] See Time Warner Telecom Inc SEC Form 10-K for fiscal year ending December 31, 2008 at 58.

ratepayers. With average revenues of $110/month ($1,320/year),[24] granting cable operators access to fully constructed pole distribution corridors at the miniscule rate of a few dollars per pole per year saves them a lot of money.

One of the huge problems with the existing cable-only pole attachment subsidy is that there is simply no reason to believe that cable operators will take the tens of millions that they save on pole attachments in urban and suburban systems, where customers and revenues are abundant, and invest that money in rural areas where customers and potential revenues are scarce, and there is little chance that they will receive an adequate return on their investments.[25] That, of course, is the reason why these areas have no wireline broadband service today.

As explained by the *Coalition* in the Pole Attachment proceeding, the primary reason the cable industry does not deploy high speed broadband service in rural areas is the enormous expense associated with head-end equipment installation and system upgrades – not the relatively minute costs associated with pole attachment rentals.[26] This was evidenced by the Declaration of a rural cable operator who testified last year in the pole attachment rulemaking proceeding before the Arkansas Public Service Commission.[27]

[24] Comcast Corporation Form 10-K for fiscal year ending December 31, 2008 at 26.

[25] The same argument applies if cable companies received free rent on their office space. While this savings may help their bottom line, there is no reason to believe they will invest those savings to provide broadband service to sparsely-populated rural America.

[26] *See*, June 5, 2008, *Ex Parte* Communication filed by the *Coalition* in the Pole Attachment Proceeding. This letter described a Declaration of Dennis R. Krumblis of Buford Media Group LLC ("Buford"), submitted by the Arkansas Cable Telecommunications Association last year in an ongoing proceeding before the Arkansas Public Service Commission, that makes clear that the primary reason the cable industry does not deploy high speed broadband service in rural areas is the enormous expense associated with head-end equipment installation and system upgrades – not the relatively minute costs associated with pole attachment rentals.

[27] *Id*.

5. Rural Broadband Investment Will Occur Only With Targeted Subsidies To Cover Up-Front Capital Costs

Since the costs associated with system construction, head-end equipment and system upgrades are the primary impediment to broadband development in rural areas, the best solution to promoting broadband development in unserved rural areas is to target subsidies to cover the capital costs associated with that construction.

NCTA itself recognizes the need for targeted subsidies. Rather than continue subsidizing areas where broadband service already exists, NCTA calls for targeted subsidies to unserved areas:

> But targeting subsidies and financial incentives to geographic areas where the marketplace is not currently working – areas that remain *unserved* by any broadband facilities – would be a sensible and effective way to increase deployment and availability of broadband in this country. It would use government resources to achieve an important policy objective without wasting substantial sums of money and without undermining the benefits of marketplace competition. NCTA has encouraged NTIA and RUS to distribute funding to unserved areas and, as discussed below, the Commission should consider how it can adapt the USF program in this way as well.[28]

NCTA's request, therefore, is that subsidies be eliminated to level the playing field in the 92 percent of the country where broadband already exists,[29] and that subsidies be targeted to the eight percent of the country where it does not.

NCTA advocates Universal Service Fund reform to "enable the commission to direct funding to those areas where no provider otherwise would invest in broadband facilities."[30] NCTA notes that "[w]hile market forces brought multiple broadband networks to most areas of

[28] NCTA Comments at 27 (emphasis in original).

[29] NCTA Comments at ii. ("the cable industry alone now makes high-speed Internet service available to over 92 percent of American households").

[30] NCTA Comments at 29.

the country, some areas are so remote or sparsely populated that no provider has been willing to make the necessary investment."[31]

This type of targeted funding is also consistent with "Connecting America Act of 2009" legislation that Senator Hutchinson recently introduced in Congress, which would create limited duration tax credits for companies that invest in broadband infrastructure and creating a bond program so that communities can raise funds for their own broadband investments.[32]

NCTA and Senator Hutchinson are absolutely correct that providing targeted subsidies for rural system capital costs will spur the deployment of broadband in rural areas.

Continuing colossal pole attachment subsidies to gigantic cable television companies in the urban and suburban areas that they already serve, however, makes no sense at all. Not only does broadband already exist in those areas, it is also unlikely to increase broadband investment in unserved rural areas. And subsidizing one industry (cable) more than another (CLECs) with artificially low attachment rates distorts the market for existing and future broadband services and reduces the competition that NCTA itself understands is necessary to spur the development of broadband services.[33]

6. The Commission Has No Authority To Reduce The Telecommunications Attachment Rate For CLEC Attachers

If the Commission establishes a broadband pole attachment rate, CLECs (and cable operators, reluctantly) would like the Commission to reduce the pole attachment rate for Section 224 broadband attachments to the artificially low, grossly subsidized cable-only rate. Time Warner Cable claims that "there is a broad consensus (which includes may pole owners) that the

[31] NCTA Comments at 32.

[32] Connecting America Act of 2009, S. 1447, 111th Cong. (2009).

[33] *See* NCTA Comments at 26.

Commission possesses the statutory authority to apply the cable rate to CLECs in this circumstance."[34]

Even if extending an antiquated, inefficient, unproductive and unfair subsidy to CLECs as well as cable operators made any sense from a policy perspective, Time Warner Cable is incorrect as a matter of law that the Commission possesses such statutory authority. Electric utility pole owners, for one, do not believe the Commission possesses any such authority at all, and for very good reasons.[35]

The Section 224(e)(1) telecom attachment rate specifies the rate to be charged by "telecommunications carriers to provide telecommunications services."[36] This plain statutory language therefore specifies that if a CLEC provides telecommunications service, it must at least be assessed the telecom attachment rate.[37]

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[34] Time Warner Cable Comments at 25 (June 8, 2009).

[35] Most electric utility pole owners agree with the *Coalition* that the Commission must establish the attachment rate for commingled telecom/broadband Internet service at or higher than the Section 224(e) telecommunications rate, as reflected in the following Comments in the Pole Attachment Proceeding: Comments of the Edison Electric Institute and Utilities Telecom Council at 97 ("[T]he Commission has jurisdiction to increase the rate paid by cable systems to at least the same rate as the telecom rate. In any event, a single rate cannot be lower than the telecom rate."); Comments of the Utilities Telecom Council at 15 ("[B]roadband attachments by telecommunications carriers and cable telephony providers must also be subject to the telecommunications rate by virtue of the underlying use of the attachment for telecommunications services. Anything less than the telecommunications rate would frustrate Congress's intent in Section 224(e)."); Reply Comments of Florida Power & Light, Tampa Electric and Progress Energy Florida, at 20 ("Section 224(e) obligates telecom carriers to pay the telecom rate regardless of what other services they may be providing through their attachments. Charging anything less than the telecom rate for CATV broadband attachments would continue to put CLEC broadband providers at a competitive disadvantage."); Reply Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power, at 2 ("If the Commission wants to unify the rate for CLEC and CATV broadband attachments, there is only one way to do it – at the telecom rate. Section 224(e) requires this result."); Reply Comments of American Electric Power Service Corporation, Duke Energy Corporation, Entergy Services, Inc., PPL Electric Utilities Corporation, Progress Energy, Southern Company, and Xcel Energy Services, Inc., at 3 (strongly endorsing Edison Electric Company and Utilities Telecom Counsel Reply Comments).

[36] 47 U.S.C. § 224(e)(1).

[37] *Coalition* Comments in the Pole Attachment Proceeding at 7-12 (March 7, 2008). As explained by the *Coalition* in the Pole Attachment Proceeding, this telecom rate itself represents an enormous subsidy for CLEC attachers, but it is considerably better than the colossal subsidy provided by the cable-only rate.

The Section 224(d) cable-only attachment rate is altogether different, because it applies to "a cable system solely to provide cable service."[38] The Commission therefore is not required to assess the Section 224(d) cable-only rate if a cable operator provides broadband in addition to cable service.

The Supreme Court agrees with this analysis. In *Gulf Power II*, the Court reviewed and affirmed the FCC's decision to apply the Section 224(d) cable-only rate for a cable system providing cable service comingled with Internet service, but recognized that the FCC could have chosen a different rate had it wanted to.[39] Both the Commission and the Court, however, recognized no such flexibility with respect to the Section 224(e) telecommunications rate.

In its Order being reviewed, the Commission recognized that the Section 224(e) telecom rate is a mandatory rate, noting that "a cable television system providing Internet service over a commingled facility is not a telecommunications carrier subject to the revised rate mandated by Section 224(e) by virtue of providing Internet service."[40] The Commission left no doubt that a cable operator providing telecommunications service must pay the higher, mandated Section 224(e) telecommunications rate:

> We note that in the one case where Congress affirmatively wanted a higher rate for a particular service offered by a cable system, it provided for one in section 224(e). In requiring that the Section 224(d) rate apply to any pole attachment used 'solely to provide cable service,' we do not believe Congress intended to bar the Commission from determining that the Section 224(d) rate methodology also would be just and reasonable in situations where the Commission is not statutorily required to apply the higher Section 224(e) rate.[41]

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[38] 47 U.S.C. § 224(d) (emphasis added).

[39] *National Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335 (2002) ("*Gulf Power II*").

[40] *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, at ¶33 (1998) (emphasis added).

[41] *Id*. at ¶34 (emphasis added). The Commission even requires cable operators to notify utility pole owners when they start providing telecommunications service:

On review, the Supreme Court found "sensible" the FCC's analysis that if Internet service were telecommunications, the mandatory Section 224(e) telecommunications rate would apply to a cable operator providing Internet service.[42]

The Court not only affirmed the Commission's analysis, the Court on its own concluded that the Section 224(e) rate is a mandatory rate that must apply to telecommunications carriers providing telecommunications services: "If the FCC should reverse its decision that Internet services are not telecommunications, only its choice of rate, and not its assertion of jurisdiction, would be implicated by the reversal."[43] The Court therefore recognized that the attachment rate would change from the cable-only rate to the telecom rate because Section 224(e) requires a telecommunications carrier providing telecommunications service to be charged the Section 224(e) telecommunications rate.

The FCC and Supreme Court agree, therefore, that if a cable operator or CLEC provides telecommunications service, that entity must pay the telecommunications attachment rate.

While the telecom rate is the minimum rate that can be charged to a cable operator or CLEC providing telecommunications, there is nothing in the Commission's or Court's analysis that prevents the Commission from approving a surcharge rate in addition to the telecom rate when such an entity provides broadband service in addition to telecommunications service. In

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> We also disagree with utility pole owners that submit that all cable operators should be "presumed to be telecommunications carriers" and therefore charged at the higher rate unless the cable operator certifies to the Commission that it is not "offering" telecommunications services. We think that a certification process would add a burden that manifests no benefit. We believe the need for the pole owner to be notified is met by requiring the cable operator to provide notice to the pole owner when it begins providing telecommunication services. The rule we adopt in this Order will reflect this required notification.

Id. at ¶35 (footnotes omitted).

[42] *Gulf Power II*, 534 U.S. at 337.

[43] *Gulf Power II*, 534 U.S. at 338.

this way, the Commission can prescribe a rate for CLECs that is in line with the City of Seattle rate proposed by the *Coalition* and endorsed by Washington State courts, which provides a much more fair allocation of costs and eliminates the subsidy altogether for both cable operators and CLECs alike.[44]

7. ILECs Do Not, And Should Not, Have Section 224 Attachment Rights

Windstream, like other ILECs in the Pole Attachment proceeding, asks the Commission to establish a rate that ILECs would pay to attach to electric utility poles, arguing that a lower rate is needed to level the playing field between ILECs and cable or CLEC attachers.[45] This issue has been fully briefed in the Pole Attachment proceeding, and from a legal perspective, the Communications Act provides the Commission with no authority at all to regulate ILEC attachments to electric utility poles.[46] This legal fact has been recognized by the Commission and the entire industry for more than a decade.

From a policy perspective too, this ILEC request to be charged the same broadband rate as may be established for cable companies and CLECs makes no sense at all. As explained previously in the Pole Attachment proceeding, the joint use and joint ownership arrangements between electric utility and ILEC pole owners are completely different from the third party licensee pole attachment agreements entered into by pole owners with cable companies and

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[44] *See*, *Coalition* Comments in the Pole Attachment Proceeding at 26-28, 39-41. As stated in those Comments:

> A rate for commingled telecommunications and broadband service that is higher than the rate for telecommunications service alone makes sense as a "surcharge' on the basic rate paid by a telecommunications carrier providing telecommunications service. The telecommunications carrier providing telecommunications service is still being charged the telecommunications rate, but the surcharge applies to its added provision of broadband services.

Id. at 39.

[45] Comments of Windstream Communications, Inc. at 18-22 (June 8, 2009).

[46] See, e.g., *Coalition* Comments in the Pole Attachment Proceeding at 61-69.

CLECs.[47] The reason that joint use and joint ownership rates and cost sharing arrangements are different than pole attachment rates charged to licensees is because they are based on an entirely different relationship. As the *Coalition* has explained, the joint use or joint ownership relationship provides significant financial and other benefits to ILECs that are not enjoyed by cable company and CLEC licensees.[48]

Given the considerable financial and operational benefits of the ILEC-electric utility joint use/joint ownership relationships, granting pole-owning ILECs the same rate that is paid by third party licensee attachers like cable companies and CLECs would give the ILECs a huge competitive advantage. In addition, granting the ILEC half of the joint use relationship regulated rates while leaving the electric utility half unregulated would give ILECs even more leverage than they currently have at a time when electric utilities already are shouldering far more ILEC joint use and pole maintenance responsibilities than before.[49]

8. Higher Attachment Rates Make Economic Sense

One attacher endorses a broadband rate that is even lower than the FCC's cable-only rate, citing a study done by the Phoenix Center for Advanced Legal and Economic Public Policy Studies.[50] That study, funded by an unnamed source, claims (rather oddly) that a rate lower than the cable-only rate is justified because the consumer demand for cable television, broadband and telecommunications services at the retail level for those services is much more elastic than the demand for retail electric service.

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[47] *Id*. at 49-71.

[48] These benefits include: (1) far lower make-ready costs; (2) no need to seek approval from electric utility pole owners to make attachments; (3) no post-attachment inspection costs; (4) electric utilities often obtain rights-of-way for ILECs; (5) reservation of a several feet on the pole, regardless of whether they have a current need for that space; (6) avoidance of relocation and rearrangement costs; and (7) avoidance of costs charged to other attachers. *Id*.

[49] *See Coalition* Comments in the Pole Attachment Proceeding at 48-53, 56-61, 69-71.

[50] Comments of Level 3 Communications LLC at 18 (June 8, 2009).

This conclusion is dubious not only because the link between retail consumer demand for these services and pole attachment rates is unclear, but because it ignores far more relevant realities. Much more important than relative elasticities of demand for the final consumer services are the relative elasticities of demand for the distribution poles themselves among communications attachers and electric utilities. Cable, broadband and telecommunications companies all contend that they have little choice but to use utility poles to deliver their services, just like electric utilities. And like electric utilities, communications attachers need their facilities to be strung at least 18 feet above ground level using a pole that is sunk six feet into the ground. This 24 feet of space on the pole is therefore shared in common by entities with an equal need for that space. Since their relative elasticities of demand for these poles is the same, and since all attachers use those 24 feet of common space equally, they should share equally in the costs associated with those 24 feet of space.

It also appears far more relevant whether communications attachers are paying considerably less for access to utility poles than that access is worth to them. The answer is certainly yes. As explained by the *Coalition* in the Pole Attachment proceeding, communications attachers are granted access to fully constructed pole distribution corridors at regulated rates that are far below what the distribution system is worth to them, even though they pay for everything else (fiber optic cable, office rent, programming fees, salaries, contractor fees, etc.) based on the value of those goods and services.

It would also be interesting to investigate for the first time the true cost to electric utility pole owners of providing pole attachment access to communications companies. Now that utilities have had sufficient experience accommodating those attachments, such an analysis

would uncover the enormous additional expenses, discussed previously by the *Coalition*,[51] that are incurred by utilities to accommodate communications attachers. These additional expenses strongly suggest that the existing cable-only rate may very well constitute an unconstitutional taking of utility property without just compensation.[52]

B. The Commission Should Reject The Poorly-Considered Proposals Of Wireless Companies And Others Regarding Make-Ready Deadlines And Pole Top Access

CTIA, PCIA and the DAS Forum, and T-Mobile USA, Inc. in general repeat calls made by the wireless industry and other communications attachers in the Pole Attachment proceeding for faster access to electric utility poles with fewer restrictions imposed by electric utilities.[53]

These wireless companies cite to "[u]nreasonable obstruction and delay,"[54] "arbitrary and inconsistent requirements"[55] and "unsubstantiated objections"[56] by pole owners, and ask the Commission to establish rules of general applicability to resolve these concerns.

The *Coalition* responded to these claims at length in a 27-page letter filed May 1, 2009 in the Pole Attachment proceeding, which the *Coalition* attached at Exhibit J to its Comments in

[51] *See, e.g., Coalition* Comments in the Pole Attachment Proceeding at 24-25.

[52] *See*, *Coalition* Reply Comments in the Pole Attachment Proceeding at 9, citing, *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987).

[53] Comments of CTIA – the Wireless Association ("CTIA Comments"), at 19-24 (June 8, 2009); Comments of PCIA – the Wireless Infrastructure Association and the DAS Forum (A Membership Section of PCIA) ("PCIA/DAS Forum Comments"), at 6-7 (June 8, 2009); and Comments of T-Mobile USA, Inc. ("T-Mobile Comments"), at 22-23 (June 8, 2009).

[54] PCIA/DAS Forum Comments at 6.

[55] CTIA Comments at 22.

[56] CTIA Comments at 23.

this Broadband proceeding.[57] While the *Coalition* wholeheartedly supports Commission efforts to expedite the provision of broadband service throughout the country, broadband service cannot come at the expense of the safe, reliable and efficient operation of the nation's electric utility distribution systems.

As explained by the *Coalition*, there is more at stake here than just broadband. Collectively, *Coalition* members provide electric utility services to more than 14,200,000 customers and own, in whole or in part, more than 8,100,000 electric distribution poles. The Commission's Pole Attachment proceedings and these pole attachment access proposals directly impact the operation of the nation's electric utility grid and are of keen interest to the *Coalition*.

In seeking faster, easier and cheaper pole attachments, these communications companies urge the Commission to assert itself into the daily decision-making processes of electric utilities across the country. They propose that utility pole owners cede control over core aspects of their electric distribution systems. They want priority service over the utilities' own electric customers. They want the Commission to impose on utilities expedited make-ready deadlines and severe operational constraints.

In the *Coalition's* view, these proposals would compromise the safety and integrity of electric distribution systems and seriously impair the ability of utilities to operate their systems safely, reliably and efficiently.

Many of these proposals would add to the epidemic number of safety violations caused by attachers and the vast number of unauthorized attachments already burdening utility poles.

[57] Letter to Acting Chairman Copps and Commissioners Adelstein and McDowell, responding to Fibertech/KDL and BWPA make-ready deadline and pole attachment access proposals (May 1, 2009), attached to *Coalition* Comments at Exhibit J.

The serious problem of shoddy attacher workmanship – replete with huge bundles of coiled cables, wires duct-taped to poles and splices covered by garbage bags – also would increase.

The *Coalition* is concerned that these pole attachment access proposals are "supported" with inaccurate and misleading claims regarding the pole attachment proceedings in New York and Connecticut. They also fail to mention that other states have established far more reasonable pole attachment requirements than proposed by these attachers. Further, they misrepresent the scope and effect of a number of FCC rulings and make other unverified claims.

These companies include electric utility pole owners in the same anticompetitive claim with incumbent local exchange carriers ("ILECs"),[58] even though electric utilities, unlike ILECs, do not routinely compete with attachers in the provision of commercial telecommunications services. The great majority of electric utilities in fact offer no type of commercial telecommunications services whatsoever. Furthermore, unlike ILECs, electric utilities have a higher and more compelling responsibility -- operating their electric distribution systems safety and reliably despite the close proximity of workers and others to energized lines.[59]

Interested parties have not been given a fair opportunity to analyze and comment on *any* of the more outlandish access proposals made in the Pole Attachment proceeding, and the

[58] *See*, Letter of the Broadband & Wireless Pole Attachment Coalition ("BWPA") in the Pole Attachment Proceeding at 3 (February 23, 2009)("BWPA Letter") ("Moreover, some pole owners, such as ILECs and certain utilities that provide broadband and other telecommunications services, actually compete against prospective attachers. Thus, these pole owners have a disincentive to issue attachment permits. Needless to say, such companies generally do not wish to help facilitate their competitors' service." (emphasis in original). *See also*, Letter of the BWPA in the Pole Attachment Proceeding at 7 (March 27, 2009).

[59] *See*, 47 U.S.C. § 224(f)(2), which specifies that electric utility pole owners, in contrast to ILEC pole owners, may deny access to poles where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering reasons. *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, at ¶1177 (1996) ("*Local Competition Order*") ("Nevertheless, we believe that section 224(f)(2) reflected Congress' acknowledgment that issues involving capacity, safety, reliability and engineering raise heightened concerns when electricity is involved, because electricity is inherently more dangerous than telecommunications services. Accordingly, although we determine that it is proper for non-electric utilities to raise these matters, they will be scrutinized very carefully, particularly when the parties concerned have a competitive relationship.")

Commission has not proposed that *any* of them be incorporated into the FCC's rules. The record in the Pole Attachment proceeding is woefully inadequate to adopt any of these proposals even if the Commission were inclined to assert jurisdiction in an area – the operation and maintenance of electric utility distribution systems – where it possesses no particular regulatory expertise.

Complex and important safety, engineering and operational issues have barely been touched on in the Pole Attachment proceedings and have been developed not nearly to the point where the Commission could safely make a decision to impose these recommended pole attachment access proposals on the electric utility industry. Pole attachment decisions made by the states of New York and Connecticut, which some wireless companies have misrepresented yet claim to rely upon, were made only after exhaustive, detailed and highly technical hearings and other proceedings. These decisions were not made in a vacuum. The records developed by these states far exceed anything to date conducted by the FCC, and those decisions affect only certain types of attachments to poles owned by a small number of electric utilities in each single State.

Until regulations are proposed, expert witnesses examined and detailed technical conferences convened, the Commission will not remotely be positioned to determine how these proposed constraints will affect the integrity of electric distribution systems and the ability of electric utilities to provide electric service safely and reliably throughout the country.

One size regulation does not fit all pole owners. It makes little sense for the Commission to impose on electric utilities specific rules, presumptions and guidelines relating to access and other non-price terms when such requirements fail to consider the many differences between electric utility pole owners and the even greater differences between electric utility pole owners and ILEC pole owners.

The existing FCC complaint process entitles attachers to seek whatever relief they believe is appropriate on a case-by-case basis. This process makes a great deal of sense, because each case requires a review of all relevant factors to determine whether the actions taken by either party were unreasonable. Hard and fast rules, presumptions and guidelines ignore the unique operational characteristics of electric utility systems and would allow attachers to violate the utilities' critical operational requirements.

The access proposals raised by communications attachers in the Pole Attachment proceeding and repeated by these wireless carriers in this proceeding go to the heart of electric utility construction and operation. The adoption of any of these proposals as a presumptive nationwide standard would fail to consider the legitimate interests of electric utilities, as well as the interests of State Public Utility Commissions and local regulators, many of which have imposed specific requirements of their own to ensure the safe and reliable utility operations within their respective jurisdictions.

Behind each of these access proposals is the concept that attachers, not utilities, know best how to construct and operate electric utility distribution systems and control how those systems are managed. This notion is contrary to the public interest and is as dangerous as it is far-fetched. It should be soundly rejected by the Commission.

C. Proposals To Expand The Scope Of The Pole Attachment Act Should Be Rejected

The Wireless Communications Association International, Inc. asks the Commission to assert jurisdiction over attachments made by wireless carriers that provide only broadband service, not telecommunications.[60] The Pole Attachment Act, however, covers attachments only

[60] Comments of The Wireless Communications Association International, Inc., at 26-29 (June 8, 2009).

by cable television systems and providers of telecommunications services.[61] There are also common sense reasons not to mandate access for those entities, considering the number of WiFi providers, the number of antennas required by each one to provide service, and the overwhelming effect that so many additional wireless attachments would have on electric utility operations.

FiberTower Corporation also asks the Commission to assert jurisdiction over non-telecommunications wireless attachments, but also seeks Commission jurisdiction over attachments to electric utility transmission towers.[62] As with non-telecommunications wireless attachments, the Commission lacks jurisdiction over attachments to transmission towers.[63] And from a practical perspective, attachment practices and concerns applicable to distribution facilities are far different than those associated with transmission towers, which are far taller in height than local distribution poles and transmit far higher amounts of electricity.

FiberTower also recommends modifying the Pole Attachment Act to remove the ability of electric utilities to deny access for lack of capacity on the pole.[64] FiberTower suggests that ILEC and electric utility pole owners are similarly situated, and because ILECs lack this power there is no reason to give it to electric utilities.[65] Electric utilities and ILECs are not similarly situated, however, since ILECs compete with FiberTower and other communications attachers and electric utilities with few exceptions do not. In addition, electric utility distribution is far more operations-intensive and hazardous than the delivery of communications service. Electric

[61] 47 U.S.C. § 224(a)(4).

[62] Comments of FiberTower Corporation, at 13 (June 8, 2009) (“FiberTower Comments”).

[63] *Southern Co. v. FCC*, 293 F.3d 1338, 1345 (11th Cir. 2002) ("The text of the statute, coupled with the presence of this reverse-preemption clause, make it plain that the Act's coverage was intended to be limited to the utilities' local distribution facilities, and was not to extend to the general regulation of interstate transmission towers and plant.")

[64] FiberTower Comments at 16.

[65] *Id*.

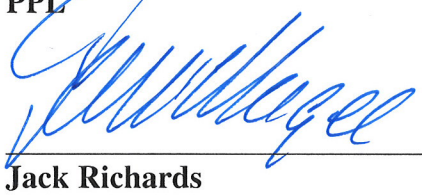
utilities need final control over those facilities, and should not be required in every instance to disrupt their operations to undertake the extensive work required to change out poles, particularly if a large amount of that work is required in a short amount of time. That being said, FiberTower's proposal is largely a solution in search of a problem, as electric utility pole owners regularly comply with Section 224 attacher requests to replace poles when capacity is full.

WHEREFORE, THE PREMISES CONSIDERED, the *Coalition of Concerned Utilities* urges the Commission to act in a manner consistent with the views expressed herein.

Respectfully submitted,

COALITION OF CONCERNED UTILITIES

Allegheny Power
Baltimore Gas and Electric Co.
Dayton Power and Light Co.
FirstEnergy Corp.
Kansas City Power and Light
National Grid
NSTAR
PPL

By: 

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